UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMY TUTEUR, M.D., Plaintiff, v. GINA CROSLEY-CORCORAN, Defendant.	)	C.A. No. 13-cv-10159-RGS

DEFENDANT'S OPPOSITION TO MOTION OF NON-PARTIES ELECTRONIC FRONTIER FOUNDATION AND DIGITAL MEDIA LAW PROJECT FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

"An amicus brief is normally only allowed when a party is not represented competently or is not represented at all…."[1]

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It is rare – perhaps sadly so – that one has both the opportunity and a reason to praise the litigation skills of opposing counsel. This, then, is something of a unique opportunity. Attorney Beck, a former partner with the national law firm Foley & Lardner LLP, and Attorney Riden, a former senior counsel to Foley & Lardner, have, collectively, almost 40 years of sophisticated litigation experience. Among his many accolades, Attorney Beck is AV rated by Martindale-Hubbell, a Chambers recognized attorney, a Massachusetts Super Lawyer, a Top 100 New England attorney, and a nationally recognized authority on trade secret and non-competition law. Attorney Riden is a Massachusetts Super Lawyer, a recipient of the Best Lawyers designation, a frequently quoted legal authority, and a former appellate law clerk. They are, in short, eminently qualified to represent the interests of Plaintiff in this action and to fully brief the issues raised by this Court's Order of April 10, 2013, requiring them to show cause why the present action should

[1] *Gabriel Technologies Corp. v. Qualcomm, Inc.*, 2012 U.S. Dist. LEXIS 33417, *15 (S.D.N.Y. 2012).

not be dismissed.

This being the case, the addition of two *more* legal Goliaths will do little to advance this Court's understanding of the issues raised (which do not seem to be so complex as to cry out for the assistance of non-parties), and instead will only needlessly multiply the costs of an already overly-costly litigation. For the reasons stated herein, Defendant Gina Crosley-Corcoran respectfully requests that the non-party requests for leave to file an amicus brief be denied.

ARGUMENT

Unlike the Rules of Appellate Procedure, which specifically contemplate the filing of Amicus Briefs (*see* Fed. R. App. P. 29), the rules governing the district courts contain no such cognate provision. Nevertheless, there is no question but that this Court has the discretion to accept or deny a request for leave to file an amicus brief. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970)(holding that a District Court's decision whether to accept an amicus brief is "within the sound discretion of the court"). Even so, the rule in this Circuit is that "a district court lacking joint consent of the parties should go slow in accepting… an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance."[2] *Id.* In addition, "it has been noted that '[a]t the trial level, where issues of fact as well as law predominate, the aid of amicus curiae may be less appropriate than at the appellate

[2] Although the EFF and DMLP are correct in their assertion that an amicus curiae need not be impartial, it is equally true that "the degree of partiality is an appropriate consideration for the court with regard to the appearance of an amicus curiae." *Prof'l Drug Co. v. Wyeth, Inc.*, 2012 U.S. Dist. LEXIS 147607 (D.N.J. 2012). In the present case, Plaintiff has herself given voice to the partiality of the proposed amici, proclaiming on her website (within hours of the EFF and DMLP filing their motion): "the Electronic Frontier Foundation and the Harvard Law School Digital Media Project file to submit an amicus brief in support of my claim." *See, Exhibit 1. See also Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party.")

level.'"

Prof'l Drug Co. v. Wyeth Inc., 2012 U.S. Dist. LEXIS 147607 (D.N.J. 2012), *quoting U.S. v. Alkaabi*, 223 F.Supp.2d 583, 592 (D.N.J. 2002).

The reasons to reject the intrusion of non-party amicus curiae are many. Judge Prosser articulated some of the most fundamental in *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003):

> The judges of this court will therefore not grant rote permission to file such a brief, and in particular they will deny permission to file an amicus brief that essentially duplicates a party's brief. …The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.
>
> …In my experience in two decades as an appellate judge, however, it is very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting. Those who pay lawyers to prepare such briefs are not getting their money's worth.

See also Strasser, supra ("At a minimum, reply poses a burden on the opposite party, who may, in addition, feel that he is outnumbered"); *McCarthy v. Fuller*, 2012 U.S. Dist. LEXIS 43701, *3-4 (S.D. Ind. 2012)("The reasons militating against permission to file amicus briefs… are compelling. First, amicus briefs pose a significant additional burden on the court and likely on the opposing party, who often deems it necessary to respond to the arguments the briefs have advanced. Second, more often than not, amicus participation is not truly for the benefit of the court, but rather to bolster the advocacy of a party and provide that party additional briefing to which it would not be entitled under the applicable rules of the court. Third, amicus practice tends to drive up the costs of litigation"); *Beesley v. Int'l Paper Co.*, 2011 U.S. Dist. LEXIS 132578, 4-5 (S.D. Ill. 2011)("Boeing believes that it has an interest in its case that may be

affected by the decision in this case and that by filing an amicus brief it will be able to 'complement' the arguments defendants advance. The Court finds that complementing defendants' arguments is not sufficient reason to allow an amicus brief. …Boeing has failed to convince this Court that its attempt to file an amicus brief is nothing more than an attempt for the defendants to get another bite at the apple, one of the policies behind denying a party's brief"); *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003)("we suspect that amicus briefs are often used as a means of evading the page limitations on a party's briefs"); *SEC v. Hirsch Org., Inc.*, 1982 U.S. Dist. LEXIS 11052, *2 (S.D.N.Y. 1982)("Courts have been reluctant to accept briefs submitted by amici. …where the court finds that the parties have sufficiently set forth the relevant issues to be addressed, the submission of additional papers is not warranted"); *Commonwealth v. U.S. Dep't of Health and Human Services*, 2010 U.S. Dist. LEXIS 40118, *5 (D. Mass. 2010)(rejecting request to file amicus brief where the court does not believe that the proposed brief "would assist existing counsel in presenting the relevant legal issues"); *Prof'l Drug Co. v. Wyeth Inc.*, 2012 U.S. Dist. LEXIS 147607 (D.N.J. Oct. 2, 2012)("Plaintiffs are represented by competent counsel who have ably addressed the relevant issues relating to the motions to dismiss. Doing little more than duplicating arguments raised by the parties is not the proper role of an amicus curiae.") [3]

The concerns articulated by Judge Prosser (and others) are manifest here. The EFF and

[3] EFF and DMLP's citation to *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128 (3d Cir. 2002) for the proposition that the court should not consider the ability of existing counsel to fully and competently brief the relevant issues is unpersuasive for three reasons. First, the *Neonatology* case did not deal with the question of when a district court should allow the filing of an amicus brief, but rather addressed how an appellate court should examine the issue under Fed. R. App. P. 29. Second, the case does not actually hold irrelevant existing counsel's ability to fully brief the issues. To the contrary, addressing issues unique to an appellate court, the Court there held that "it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file. Furthermore, such a motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal, and therefore the judge or judges who must rule on the motion must attempt to determine, not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently." *Id.* at 132-33. Finally, to the extent that the *Neonatology* decision is inconsistent with the cautious approach dictated by the First Circuit's decision in *Strasser*, it is not controlling precedent.

DMLP's proposed briefs plow the same furrow as the brief submitted by Plaintiff. The two briefs – filed but minutes apart from one another – each argue that the present case cannot be disposed of on a motion to dismiss because of an alleged requirement that a person issuing a takedown notice under the DMCA consider the applicability of a fair use defense before sending the takedown notice. Putting aside for the moment the legal soundness of this assertion (and, more importantly, its application to the facts of the present case, issues that Defendant intends to address in due course in its response to Plaintiff's brief), the proposed amici curiae brief does nothing more than argue the same points argued by plaintiff's counsel (albeit at greater length). The proposed brief, then, brings nothing additional to the table and instead only creates a situation where the defendant is, in essence, required to fight the same battle twice.

Conclusion

Plaintiff is fully and competently represented by experienced counsel who have identified and briefed the same issue that the amici seek leave to address. Because such briefing will, therefore, not aid the Court in its resolution of the relevant issues at hand, and because the amici's proposed brief does little more than reiterate an argument already competently made by Plaintiff's counsel, the EFF and DMLP's motion for leave to file a brief of amici curiae should be denied.

Respectfully submitted,

GINA CROSLEY-CORCORAN

By her attorney,

/s/ Evan Fray-Witzer

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on May 1, 2013.

/s/ Evan Fray-Witzer

May 1, 2013 | 0 Comments

Lawsuit update 4: the Electronic Frontier Foundation and the Harvard Law School Digital Media Project file to submit an amicus brief in support of my claim

In my last update, I reported:

> … [The judge] questioned whether I am entitled to sue Gina for DMCA abuse and tortious interference with Bluehost over one DMCA notice.
>
> It is unclear why the judge made no mention of the DMCA notices sent to my second host or the fact that Gina was soliciting others to file DMCA notices with the express purposes of pushing my site off the web. We will be reminding the judge of this in our response and expect that it will then be clear that I am entitled to sue Gina for what she did.

We submitted that reminder today and I am gratified to report that we are not the only ones who think that my case should proceed. The Electronic Frontier Foundation and the Digital Media Project of the Berkman Center for Internet & Society at Harvard Law School have submitted a motion for permission to file an amicus curia ("friend of the court") brief in support of my claim, asserting that "The Court's ruling on this claim will have significance well beyond the parties in this case." The amicus brief is attached to the motion.

Of note, the EFF is representing Stephanie Lenz in the leading DMCA case currently making its way through the courts, Lenz v. Universal Music Corp., 5:07-cv-03783 JF (N.D. Cal.).

As they explain:

> On the facts alleged, it appears that this case involves exactly the kind of DMCA abuseSection 512(f) was meant to deter. This is not a case about the tone of debate in the parties' blogs or about the merits of their respective views about childbirth. This is a case about defendant Crosley-Corcoran's alleged use of the DMCA's takedown procedure to silence a critic.

This is an important public policy issue:

> … In the week of March 5, 2013, Google alone received over four million notices, a ten-fold increase over the previous year. Copyright Removal Requests, Google Transparency Report, https://www.google.com/transparencyreport/removals/copyright/. If even a small percentage of DMCA takedown notices are improper, then thousands of persons will have their lawful speech censored. Congress enacted Section 512(f) precisely to prevent such abuse and help compensate for the lack of prior judicial approval to protect the "end-users legitimate interests."

They view the key argument as follows:

> C. Dismissal of Section 512(f) claims based on fair uses at the pleading stage could open the floodgates to private censorship.
>
> Dismissal of Tuteur's claim, particularly at this stage, would send a dangerous signal to copyright owners and end users that copyright owners need not actually consider whether a given use is authorized by law before sending a takedown. As the Supreme Court has stated, fair use is a critical "First Amendment safeguard" that helps ensure "copyright's limited monopolies [will remain] compatible with free speech principles." Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003). Fair use is particularly important where, as here, an individual wants to respond to a critic. This is because writers—whether they wish to criticize, parody, or praise the work of another—need to quote the original to make their point effectively. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
>
> If a copyright owner is not required to consider fair use when sending a DMCA takedown notice, the DMCA becomes an easy tool for censoring internet criticism: any person quoted by a critic could get the critic's speech quickly removed from the Internet. For example, an author could cause the takedown of a negative book review simply on the basis of the quotation of a few words. Such a reading cannot be reconciled with either the text or the policy of Section 512,which was intended to facilitate the growth of the Internet as a platform for free speech.

You can find the reply brief that my lawyers submitted here:

https://dl.dropboxusercontent.com/u/27713670/Tuteur-20130501_Show_Cause_on_DMCA_violation_%26_jurisdiction_-_as_filed.pdf

The motion filed by the Electronic Frontier Foundation and the Digital Media Project of the Berkman Center for Internet & Society at Harvard Law School is here:

https://dl.dropboxusercontent.com/u/27713670/Tuteur-20130501_EFF%27s_Motion_for_Leave_to_file_Amicus_Brief.pdf

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